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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 933

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,

Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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THE EVENING NEWS PUBLISHING COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Allied Newspaper Carriers of New Jersey, James L. Hutchings, Alfred Greenhalgh, Robert A. Wrobel, Lazzard L. Chaiken, Earl Mills, Albert Mills, Herman W. Heitman t/a Mercury News Co., Peter DaRoga t/a Montclair News Co., James J. Salmon, Jr., Edwin Van Demark, Howard J. Young, Sam G[illegible]law, Martin Ginsberg, Sidney Rauchbach, Herman Am[illegible]t/a Verona News Co., Joseph Gutkowski, John Tor[illegible]les Topf, Lawrence Kocheireiss t/a Larry's News Service, and Rod Sherer t/a Unionville News,

pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on February 20, 1959, and set out in Appendix B of this petition (*infra*, p. 24).

Citations to Opinions Below.

The opinion of the District Court for the District of New Jersey (R. 612a-632a), is reported in 160 F. Supp. 568. The opinion of the Circuit Court of Appeals, printed as Appendix A hereto, *infra*, p. 14, is reported in 263 F. 2d 715.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 20, 1959. Appendix B, *infra*, p. 24. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented.

Whether a group boycott may constitute a *per se* violation of § 1 of the Sherman Act in the complete absence of record evidence or court findings of the economic power of the boycotting group.*

* Another question in this case is whether stoppage of local distribution of a newspaper constitutes a substantial restraint upon interstate commerce simply because, in the process of publishing, the newspaper uses national newsgathering services, sends its reporters beyond state lines, obtains production materials and advertising from without the state, and distributes a slight percentage (less than 2½%) of its editions out-of-state. Petitioners reserve their right to argue this question before the Court if certiorari is granted, but they do not advance the question as a basis of this petition for certiorari.

Statute Involved.

The statutory provision involved is Section 1 of the Sherman Act, as amended, 69 Stat. 282, 15 U. S. C. § 1, which provides as follows:

> "§ 1. Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy

declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Statement.

Respondent, Evening News Publishing Company (hereafter termed the "News"), instituted civil antitrust proceedings against petitioners, Allied Newspaper Carriers of New Jersey (hereafter termed "Allied"), and 19 individual home delivery dealers, alleging that petitioners' boycott of newspapers published by the News violated §§ 1 and 2 of the Sherman Act, as amended, 69 Stat. 282, 15 U. S. C. § 1. Temporary and permanent injunctive relief was requested against any further boycotting activity. The jurisdiction of the District Court was invoked because the case arises under the Sherman Act.

The News, a New Jersey profit corporation, publishes the Newark Evening News (a daily afternoon paper), and the Newark Sunday News (published on Sundays only), the daily paper having a circulation of about 290,000 copies and the Sunday paper about 335,000 copies (R. 81a). Their distribution is effected in various ways; newsstand sale, mail subscriptions, home delivery by newsboys, and home delivery by "home delivery dealers" (R. 10a, 84a, 198a). The latter are small, independent businessmen operating either from their homes or from small retail establishments such as confectionery stores, who buy papers from the News and distribute them on routes acquired either by purchase from dealers (R. 547a, 505a) or by customer solicitation (R. 552).

An average home delivery dealer pays the News 31.8 cents** for six daily papers and one Sunday paper (R. 85a), charges the home delivery customer 50-59 cents** for these papers (R 384a-386a, 490a, 499a, 558a, 578a), and serves approximately 630 customers (R. 102a-104a).* Thus a dealer who charged his customer 55 cents per week would receive a gross profit of 23.2 cents per customer, from which he must deduct truck operation and maintenance costs, depreciation and rent, wages (of delivery employees), social security taxes, and unemployment compensation contributions.

Allied is a voluntary association of some of the home delivery dealers, formed into a non-profit New Jersey corporation to act as a bargaining agent in grievances between the dealers and the News (R. 47a-48a). Prior to August, 1956, Allied operated as an unincorporated association. In February, 1956, the association complained to the News that distribution of the papers was being made to the dealers after the newsboys (R. 620a-621a), thereby giving the boys a service advantage to offer prospective subscribers. The dealers claimed they would discontinue handling the News unless late delivery from the News was stopped. The News agreed to improve its service (R. 621a).

In July, 1956, the News rejected demands by the dealers for removal of newsboys who were making home deliveries

** These figures reflect the prices in effect during the trial below. On the day following entry of the Final Judgment, the News increased the price of its daily paper from 5 cents to 7 cents per copy. The price charged the home delivery dealers by the News was likewise increased.

* The average total number of customers is estimated from testimony concerning the amount of papers normally purchased by 46 home delivery dealers who refused to accept papers on May 20, 1957, the first day of the trial below.

in the same geographical area as that of the dealers,* and on July 14, a total of 16 members of Allied refused to accept any further deliveries from the News (R. 621a-622a). This refusal, which failed and ended after two weeks, affected about 15,000 daily papers (about 5% of total daily circulation) and a somewhat lesser amount on Sunday (about 4% of total Sunday circulation) (R. 622a-623a).

A month later the 19 home delivery dealers who are the individual petitioners in this case incorporated Allied. Negotiations with the News for the removal of substitute newsboys added during the July, 1956, boycott — many of whom had taken over substantial portions of the dealers' routes (R. 407a, 481a, 482a) — continued into January, 1957. At that point, a second boycott was proposed, and the News instituted the present proceedings (R. 623a).

On May 20, 1957, three days before the trial of this action began, 46 members of Allied** again refused to handle newspapers from the News, affecting about 32,000 daily and Sunday papers (about 11% of the daily distribution and 10% of the Sunday distribution). However, by resort to other means of service, the News succeeded in delivering 16,000 papers daily to the readers affected by this second boycott, thereby reducing the total decrease in home de-

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* These demands originated from the dealers' fear that the News was attempting to replace them with newsboys, thereby destroying the substantial capital value of their routes (R. 208a, 393a-395a, 479a-481a, 495a-497a, 565a-568a). Among other points of dispute, News' subscription drives advertising weekly rates of 50 cents per week (the usual newsboy price) added to the fear of the dealers. While the District Court found that the News was not in fact conducting any systematic exclusion tactics (R. 627a), that does not eliminate the fear of the dealers, although it may indicate a lack of basis for that fear, in the judgment of one not affected by it.

** All 46 dealers did business in New Jersey. Not one of them or any other member of Allied delivers papers outside of the State of New Jersey (R. 102a, 103a).

livery distribution to about 5% of the normal amount. This boycott lasted about one month before it, too, ended in failure for the dealers when the District Court entered an interlocutory injunction on June 18, 1957 (Appendix A, *infra*, p. 17).

After the trial below and prior to decision thereof, the District Court Judge died and another was assigned, who, after written and oral argument by counsel, held that Allied had violated § 1 but not § 2 of the Sherman Act (Appendix A, *infra*, p. 18). This District Court found a substantial restraint of commerce in the relevant market (defined as being home delivery distribution of the News) (R. 626a), apparently basing that decision upon the fact that 16,000 papers were affected by the first boycott and 32,000 papers by the second boycott. While the District Court held that Allied did not possess requisite economic power for a violation of § 2 of the Act (R. 631a-632a; Appendix A, *infra*, p. 18), it found a violation of § 1 simply because "[c]ombination boycotts, like other group action to coerce, have long been condemned as unreasonable restraints under § 1 of the Sherman Act" (R. 628a), and entered permanent injunction. Upon appeal by petitioners, the Court of Appeals affirmed, holding that the decision of this Court in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958), handed down in the interim period between the District Court decision and the Court of Appeals argument, made group boycotts illegal *per se* under the circumstances of this case.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals in the instant case misconstrues and misapplies the decision of this Court in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958). Recognizing that the *Northern Pacific* case established conditions precedent to invocation of the rule of *per se* illegality under § 1 of the Sherman Act, the Court of Appeals in the instant case held that these conditions were met by showing (1) a substantial restraint of trade in the relevant market, (2) affecting an appreciable amount of commerce (Appendix A, *infra*, p. 22). But the test in *Northern Pacific* requires (1) "*sufficient economic power* • • • to appreciably restrain free competition in the [relevant] market", (2) affecting a "not insubstantial amount of commerce". 356 U. S. 1, at 6. (Emphasis supplied)*

The first of the conditions laid down in *Northern Pacific* refers to economic power to produce an appreciable restraint, and not simply whether an appreciable restraint has in fact occurred. Ordinarily, of course, restraint does not exist in fact unless power to restrain also exists.** Nevertheless, it is extremely important that the procedure set out in *Northern Pacific* be followed exactly, in order that application of the Sherman Act be avoided in just such cir-

* This assumes that the test stated in *Northern Pacific* for tie-in sales applies by analogy to group boycotts. It could hardly apply directly, notwithstanding the view of the Court of Appeals, because it was expressed in a tie-in sale case, in language peculiar to such sales. 356 U. S. 1, at 6.

** That may not always be true. A group boycott might produce an appreciable restraint, in the absence of any real power to restrain, simply because the persons affected refrain, for reasons of their own, from employing available counter-steps.

cumstances as those of the present case where small businessmen—economic midgets—combined to gain some semblance of parity with an economic giant upon which their very livelihood depends, and to which their livelihood is financially *de minimis*.

Had either court below in the instant case referred directly to the economic power of Allied, the inconclusive nature of the fact that 15,000 home delivery copies were affected by the first boycott and 32,000 copies by the second boycott would have been immediately apparent. The 32,000 copies controlled by the dealers in question represents but 15% of the daily *home delivery* market, not of the entire circulation.* Moreover, that figure must be diluted by the ability of the News to fill the vacancy (or any vacancy, for that matter) caused in the home delivery market with additional newsboys** and its own delivery trucks. In 1957, the News provided substituted home delivery for 16,000 of the 32,000 copies affected by the second boycott, reducing the total number of copies affected by that boycott to 7½% of the home delivery market. The significance of the dealers' ability to affect 32,000 home delivery copies is further decreased by the dependence of the dealers upon the News for the bulk of their business. Newspapers purchased from the News represented well over 90% of the afternoon business of the dealers called to the stand by the News during trial; and one-third of those dealers had no morning delivery business (Appendix C, *infra*, pp. 26, 27). No record evidence appears that either customers or subscribers were

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* Home delivery dealers distribute about 67,000 daily papers throughout New Jersey (R. 31a, 85a), and it may be inferred that newsboys deliver approximately 140,000 daily copies to subscribers' homes (R. 31a, 115a) totaling 207,000 home delivery daily copies.

** The evidence disclosed that, during the 7 years preceding the trial below, the number of respondent-owned "newsboy routes" increased from 800 to 2,500 (R. 115a).

lost to the News, and repeated conversations in the record illustrate a thoroughly contemptuous attitude by the News toward the purported "pressures" of the first and second boycotts (R. 268a, 396a). Judge Modarelli of the District Court summed up the economic weakness of the dealers when, in granting the News' motion for temporary injunctive relief, he observed, "Of course, the defendants are going to suffer irreparable injury, too." (R601a).

2. An even more basic misapplication of *Northern Pacific* may lie in the tacit assumption of the Court of Appeals that the same conditions precedent to imposition of a *per se* rule of illegality apply to group boycotts as to tie-in sales, or at least that a proper analogy may be made to the one from the other. It is clear that not all group boycotts are illegal *per se*, *United States* v. *Insurance Bd. of Cleveland*, 144 F. Supp. 684 (N. D. Ohio 1956), and that certain conditions must be met before applying the *per se* rule, *Fashion Originator's Guild of America, Inc.* v. *Federal Trade Commission*, 114 F. 2d 80, 84 (C. A. 2, 1940), affirmed without comment on this point, 312 U. S. 457 (1941). But whereas the power condition referred to in *Northern Pacific* is simply power to produce an effect on a relevant market, a more sweeping sort of power has been apparent in each group boycott case before the United States Supreme Court; namely, broad economic and financial strength effectively to oppose the boycotted party or to maintain efficient control of the various elements of the boycotting group. See *e. g.*, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 27 Law Wk. 4253 (U. S. 1959) (boycotting group included General Electric, Emerson, RCA, Zenith and Admiral, opposing a single retailer); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*,

Inc., 340 U. S. 211 (1951) (boycotters were Seagram and Calvert, opposing certain wholesalers); *Associated Press* v. *United States*, 326 U. S. 1 (1945) (boycott by all members of AP, "the chief single source of news for the American press," 326 U. S. at 11, against certain newspapers); *Fashion Originator's Guild of America, Inc.* v. *Federal Trade Commission*, 312 U. S. 457 (1941) (boycotting group controlled nearly 40% of all dresses wholesaling at $6.75-$10.75 in this country, and 60% of all higher priced dresses); *Loewe* v. *Lawlor*, 208 U. S. 274 (1908), (boycotters were described as "members of a vast combination," a national hatters union); *Montague & Co.* v. *Lowry*, 193 U. S. 38 (1904), (boycotting group included all tile manufacturers with whom the boycotted party ordinarily dealt).

All these cases presuppose the finding that economic power in the boycotting group in this sweeping sense is prerequisite to finding a group boycott illegal *per se*, certainly a reasonable condition when one considers the gravity of applying a *per se* rule of illegality. Moreover, this broader condition precedent as to group boycotts is perfectly consistent with the less extensive showing required as to tie-in sales: the very existence of the tie-in sales suggest broad economic superiority in and of itself, since the sale cannot be consummated until the buyer has "knuckled under" by curtailing his freedom in the market of the tied product in order to gain access to the tying product. The mere existence of group boycotts, however, is no indication whatsoever of superior or even substantial economic power in the boycotting group. Nor can any fair inference of substantial economic power be drawn from the initiation or existence of a boycott by a group. Nor is the maintenance of such

boycotts any indication in and of itself of coercion of individual members of the group by the whole group: unity of action in a group devoid of any vestige of collective sanction against individual members—and that is the position of Allied*—may well indicate nothing more than continued voluntary desire in each member to pursue the collective goal.

Except where overwhelming economic power in the boycotters is obvious, this broader power concept certainly presupposes a comparison of the economic strength of the two antagonistic parties, and of the strength of the group as against any individual member thereof. In the instant case, however, the News introduced no evidence to show the strength of Allied, and, indeed, significantly failed even to reveal its own financial and economic position.

3. Clearly the question presented is of great importance in proper administration of the antitrust laws. As modern business complexities make use of the Rule of Reason more difficult, should the *per se* area of illegality under the Sherman Act be relied upon even to the detriment of small business? The *Northern Pacific* case was a step toward clarification, but its effectiveness is greatly endangered by the decision below in the instant case. If the standards laid down in *Northern Pacific* were intended to cut across the entire area of *per se* illegality, then that principle should be brought out in the present case, lest confusion be compounded rather than dissolved.

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* Note that, unlike many boycotting groups, the individual members of Allied do not deal or trade with each other. Accordingly, any individual member may incur the disfavor of the group with economic impunity. Nor is there any security fund or other deposit required or made upon joining the group which would be forfeited upon ouster therefrom.

Moreover, the present case represents a significant breach in traditional usage of *per se* rules in the area of group boycotts, threatening automatic application of the Sherman Act to the most modest enterprise, and stripping from small business its only rallying point of survival—unity—against the powerful encroachment or dictation of mammoth enterprises. It assuredly will lead to other and numerous Sherman Act proceedings against small business combinations, each of which must face the basic problem again; namely, whether *Northern Pacific* was intended to have such a result.

It is respectfully submitted that the dogmatic application of the *Northern Pacific* case by the Court of Appeals to this case has supplied the powerful arm of the judiciary in aid of a large corporation having a virtual monopoly and tremendous resources, to smother the feeble attempts of the individual petitioners, a small group of entrepreneurs, who had joined together to attempt to make their feeble protests effective. Their attempts could not possibly suppress or destroy competition, nor did the record below show that the individual petitioners had sufficient economic strength even to affect competition adversely.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME C. EISENBERG,
Counsel for Petitioners.

Dated: May 18, 1959.

APPENDIX "A".

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,647

THE EVENING NEWS PUBLISHING COMPANY, A CORPORATION,

Plaintiff-Appellee,

v.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, A CORPORATION, ET AL.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 20, 1958

Before BIGGS, *Chief Judge*, and MARIS and MCLAUGHLIN, *Circuit Judges.*

Opinion of the Court.

(Filed February 20, 1959)

By MCLAUGHLIN, *Circuit Judge.*

This anti-trust litigation arises from defendants' efforts to force plaintiff to eliminate newsboy home delivery of plaintiff's newspapers, The Newark, New Jersey Evening and Sunday News.

Appendix "A"—Opinion of the Court.

The defendants consist of 19 home delivery dealers and a New Jersey non-profit corporation, Allied Newspaper Carriers of New Jersey, formed by the individual defendants in August, 1956. The corporation acted as bargaining agent for its members. By June, 1957 its membership had increased to 133 home delivery dealers.

The facts found by the district court were mostly conceded, though there seems some misunderstanding as to this by appellants' present counsel. In any event there is substantial support in the record for the court's fact findings which are set out in great detail in the opinion below, F.Supp. (1958). Only those necessary for present purposes will be noted.

Allied on February 15, 1956, was an unincorporated association of Home Delivery Dealers of which James L. Hutchings was president. On that date he, with 17 other members, complained to the News Circulation Director about late deliveries of the paper to the dealers. They threatened to discontinue handling the News unless this was remedied. Plaintiff agreed to improve its service. After that and prior to July 13, 1956, Hutchings demanded of the Circulation Director that all newsboys delivering the News in any territory of the Dealers should be forced out of business by plaintiff refusing to sell its newspapers to them. Plaintiff refused and was again threatened by the Dealers' spokesman with a refusal to handle the News by the Dealers. Within the same period, the Dealer representative demanded that plaintiff "shut out" any distributor other than the newspaper man or Dealer in the particular area allocated to him by the Dealers themselves. On July 13, 1956, Hutchings and an attorney, who later represented the defendants at the trial, gave the News Circulation Director the ultimatum that unless plaintiff discontinued the use of newsboys in the distribution of its

newspaper, the Dealers would no longer handle it. This was refused and that same day the Dealers refused to accept copies of the News from plaintiff. The latter tried to fill the gap with substitute carriers, selling its papers to them on the same terms as had existed between plaintiff and its other newsboys and the Dealers.

The number of newspapers affected daily was about 15,000; on Sunday the amount was somewhat less. The Dealers' action continued for about two weeks with 16 of the individual defendants participating. Just prior to its start, the Dealers gave written notices to their customers accusing the News of unethical practices, explaining that they would be unable to deliver the paper temporarily and suggesting that the Dealer be notified if the customer wished to substitute another paper. Certain of the Dealers gave their customers a notice which accused the News of trying to eliminate them and confectionery stores from the newspaper business and thus control circulation, etc. This notice warned that plaintiff would tempt little children into becoming newsboys by giving them the idea they would become little merchants handling their own routes. Some of the notices conveyed the idea that children acting as newsboys were forced to make their deliveries in bad weather and when they were ill. Other notices charged that the low rates insisted on by the News made it impossible for the Dealer to earn a living. Another form of notice said plaintiff sought men's services at boys' wages.

At the expiration of the two weeks the Dealers resumed taking and distributing the News but sought to persuade plaintiff to induce the substitute newsboys in the Dealers areas to withdraw. Business relations continued between the Dealers and the News until January, 1957, when at a meeting between Hutchings with some other Dealers and News Circulation Department personnel, demand was made

that the substitute boys be eliminated. This was refused and Hutchings for the Dealers renewed the strike threat. As a result plaintiff brought this suit charging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and seeking interlocutory and permanent injunctive relief.

An answer was filed admitting the jurisdiction of the court and all of the allegations of the complaint regarding the intrastate and interstate elements of plaintiff's business. It denied plaintiff was entitled to relief and alleged various affirmative defenses.

On or about May 20, 1957, the date originally fixed for trial of this matter, the Allied members renewed their boycott of the News. This was stopped on June 18, 1957, solely by the interlocutory injunction. During the boycott period, the Dealers refused to handle approximately 32,000 daily and Sunday copies of the papers. By expensive substitute service, the News succeeded in having approximately 16,000 papers delivered to the readers affected.

The trial of the suit started May 23, 1957 and continued intermittently until June 17, 1957. On June 18, 1957 an interlocutory injunction was allowed plaintiff. Prior to final decision the district judge who heard the matter, died and the case was reassigned. Thereafter briefs were filed and oral arguments had. At that time counsel for the defendants adopted the factual summary set out in plaintiff's main brief and withdrew the affirmative defenses of the answer. He, for the defense, continued to assert that no relief was justified under the circumstances and questioned the sufficiency of the complaint. It was conceded on behalf of the defendants that their actions complained of resulted from an agreement and combination of the individual defendants through their membership in the corporate defendant.

The district court held that there had been a restraint of trade in violation of Section 1 of the Sherman Act but that the evidence failed to sustain the charged violations of Section 2 as to monopolizing. The injunction was made permanent and the final decree was entered April 9, 1958.

Appellants on this appeal assert that the proofs fail to show a conspiracy to restrain interstate commerce. They stress that such was not their intention; they make no attempt to divide plaintiff's business into intrastate and interstate but seek to emphasize that it was not shown that any Allied member delivers outside of New Jersey; they would excuse their action as protection against discriminatory practices and unfair competition, saying that "The 'restraint' was not intended to achieve a restraint upon interstate commerce."

The truncated argument advanced would have us forget completely that interstate commerce is an inseparable, indispensable part of this plaintiff newspaper. The News does furnish neighborhood, city, county and state news to its readers. And by far the major portion of its sales are in New Jersey. But an essential element of its being, (perhaps considering its territory and the present state of this world of ours its most essential element) is the obtaining, dissemination and interpretation of national and world-wide news. Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in Lorain Journal v. United States of America, 342 U.S. 143, 151 (1951), "• • • continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of products

sold." The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in Lorain (p. 152), "• • • an inseparable part of the flow of the interstate commerce involved." That Court said further (p. 152), "Without the protection of competition at the *outlets* of the flow of interstate commerce, the protection of its earlier stages is of little worth." (Emphasis supplied.) It should be noted that in Lorain, as here, the contention was that merely a local issue was in dispute. See also Greenspun v. McCarren, 105 F.Supp. 662 (D.C. Nev. 1952); Hearst Publications v. N.L.R.B., 136 F.2d. 608, 610 (9 Cir. 1943), rev. other grounds, N.L.R.B. v. Hearst Publications, 322 U.S. 11 (1944). See generally Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 602-603, 604-605, 610 (1953).

Whatever may have been its purpose, plainly the restraint imposed by defendants did affect interstate commerce. But, suggest the appellants, plaintiff must go further than that, it must prove that the activities of the defendants directly affected interstate commerce and that there has been undue restriction thereon harmful to the general public. Again they stress what they call "the purely local activities of these defendants."[1]

The district court concluded from the evidence that the restraint on interstate commerce was undue and substantial. Our examination reveals that the record supports these findings. The Lorain opinion governs the situation before us. United States v. Yellow Cab Co., et al., 332 U.S. 218 (1947) is hardly in point but, as far as it goes, supports

[1] They urge, as they did below, that it is the plaintiff who is really fixing the prices of the home delivery of its papers. The district judge found no support in the evidence for that assertion; to the contrary ample basis for its negation. The record entitled him to those conclusions and we have no right to disturb them.

the proposition that the home delivery of the News is an integral part of the interstate operation. The other two early decisions relied on do not represent what we think is the present law.[2]

Finally, appellants assert that their concerted refusal to accept the News for home delivery did not restrain competition. They "maintain" their concession that their actions and refusal to deal with plaintiff which resulted from an agreement among themselves went no further than to relieve plaintiff of the burden of showing that a "combination" existed; that it did not relieve plaintiff of proving that the combination was one which unreasonably restrained competition.

The Supreme Court in Northern Pacific R. Co. v. United States, 356 U.S. 1 (March 10, 1958) left no doubt what the true rule is in a group boycott case like the one before us. Mr. Justice Black for the Court said at page 5:

> "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has

[2] Anderson v. United States, 171 U.S. 604 (1898); Hopkins v. United States, 171 U.S. 578 (1898).

been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210; division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271, aff'd, 175 U. S. 211; *group boycotts*, Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457; and tying arrangements, International Salt Co. v. United States, 332 U. S. 392." (Emphasis supplied).

The Northern Pacific litigation dealt with tying arrangements, one of the same category as group boycotts. Justice Black, speaking of these said at page 6:

"Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 354 U.S. 594, 606. *They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial amount of interstate commerce is affected.*" (Emphasis supplied).

There was no incredibly complicated and prolonged economic investigation in this suit such as the Supreme Court, in Northern Pacific, holds unnecessary in a group boycott. Nevertheless the district court did sit for at least eleven days hearing testimony and argument. From the record it was held that the evidence established that the restraint resulting from the Dealers refusal to handle deliveries of the News for the home delivery market had made itself felt to a substantial degree. This was based on the uncontradicted testimony that the 1956 boycott had stopped the home delivery of about 15,000 daily papers and a somewhat lesser number on Sunday; that the restraint was enhanced by the written notices the Dealers circulated among their customers; that the 1957 boycott had prevented delivery of some 32,000 papers, daily and Sunday; that the plaintiff's extraordinary costly effort to keep its home delivery readers supplied in the latter crisis only took care of about half of those cut off by the strike.

Appellee claims that the 1957 boycott affected 20% of the total circulation of the News. This is disputed by the Dealers, as complicated mathematics. Even if the percentage figure were to be considerably reduced the number of papers eliminated by the boycotts is before us. These constituted "an appreciable amount of commerce under any standard". United States v. Yellow Cab, 332 U.S. 218, 225-226 (1947).

It seems to us therefore from the record, that it was solidly established in the course of the trial that the boycotts had appreciably restrained free competition in the home delivery of the newspapers involved and that a not insubstantial amount of interstate commerce was affected. The evidence also unquestionably demonstrates the effort of the defendants to acquire a monopoly of plaintiff's home delivery business, though we agree with the district court

that it fails to establish that defendants possessed the power to actually accomplish this particular objective. Appellee strongly contends that the presence of intent to suppress competition removes the obligation of proving that a substantial amount of interstate commerce is affected. Because, as we have already stated, the record firmly supports the Supreme Court test as laid down in Northern Pacific, there is no need for us to pass upon that question at this time.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B".

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,647

THE EVENING NEWS PUBLISHING COMPANY, a corporation of the State of New Jersey

vs.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, a corporation of the State of New Jersey, et al.

James L. Hutchings, Alfred Greenhalgh, Robert A. Wrobel, Lazzard L. Chaiken, Earl Mills, Albert Mills, Herman W. Heitman, t/a Mercury News Co., Peter DeRoja, t/a Montclair News Co., James J. Salmon, Jr., Edwin VanDemark, Howard J. Young, Sam Ganslaw, Martin Ginsberg, Sidney Rauchbach, Herman Amsterdam, t/a Verona News Co., Joseph Gutkowski, John Torley, Charles Topf, Lawrence Kachelriess, t/a Larry's News Service, Rod Sherer, t/a Unionville News, and Allied Newspaper Carriers of New Jersey, a corporation,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge* and MARIS and MCLAUGHLIN, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk.

February 20, 1959.

APPENDIX "C".

Summary of the Testimony of the 33 Home Delivery Dealers called by Plaintiff on May 23 and May 24, 1957

(Transcript pages 20 to 206)

Dealer	Number of Copies of Newark Evening News Delivered Daily	Approximate Percentage of Newark Evening News Delivered to Total Deliveries of Afternoon Papers	Morning Delivery Business
Greenhalgh	2,010		Yes
Kachelriess	1,575	75%	Yes
Sherrer	1,155	90%	Yes
Albert & Earl Mills	1,450	65%	Yes
Van Demark	650	85%	No
Hutchings	825	99%	Yes
Ginsberg	801	95%	Yes
Chaiken	620	90–93%	No
Amsterdam	990	95–97%	Yes
Salmon	825	99%	No
Heitmann	475	90%	Yes
Torley	650	80%	Yes
De Roja	260	88%	Yes
Ganslaw	380	95%	Yes
Gutkowski	790	99%	Yes
Rauchbach	525	99%	No
Topf	560	97%	No
Young	375	94%	No

Appendix "C" — Home Delivery Dealers.

Dealer	Number of Copies of Newark Evening News Delivered Daily	Approximate Percentage of Newark Evening News Delivered to Total Deliveries of Afternoon Papers	Morning Delivery Business
McGuire	659	97%	Yes
Haug	1,075	95%	Yes
Kraut	360	62%	No
Shara	1,075	94%	Yes
Henrich	565	95%	Yes
Sambrat	560	99%	Yes
Youschak	775	96%	Yes
Sheldon	655	95%	Yes
Irving Rothman	750	90%	No
Harry Rothman	860	90%	No
Selecky	627	90%	No
Piserchio			
Parkway Apts.	388	96%	Yes
Others	550	94%	No
Gottesman	750	96%	Yes
Simpson	535	50%	Yes
Wrobel	650	93%	Yes

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 933

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,

Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Act of October 15, 1914, c. 323, § 16, 38 Stat. 737; 15 U. S. C. A., § 26 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,
Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Following Statutes Are Involved.

The Sherman Act—Secs. 1 and 2; Act of July 2, 1890, c. 647, secs. 1 and 2; 26 Stat. 209; 69 Stat. 282—15 U. S. C. A. secs. 1 and 2.

§ 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

§ 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punish-

ments in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209."

Act of July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.

§ 4.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; * * *"

Act of October 15, 1914, c. 323, § 16, 38 Stat. 737; 15 U. S. C. A., § 26.

§ 26.

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, * * *"

Question Presented.

The petition (p. 2) erroneously states that the question presented is whether a group boycott may constitute a *per se* violation of Section 1 of the Sherman Act in the complete absence of record evidence or court findings of the economic power of the boycotting group.

The evidence in the record amply reveals the economic power of the boycotting group. Both the trial court and the court below made findings as to (i) the total circulation of the respondent (R614a), (ii) the number of daily and Sunday papers boycotted by the Home Delivery Dealer (R624a) (hereinafter sometimes referred to as "Dealers"), (iii)

the growth in the membership of the Dealer's organization known as Allied Newspaper Carriers of New Jersey (R623a) (hereinafter sometimes referred to as "Allied"), (iv) the manner in which boycotts were imposed on respondent, i. e., as a result of agreement and combination by the boycotters (R631a), (v) the purpose of the boycott: the elimination of the newsboy as a competitor in the home delivery market (R625a-626a, 629a) and that (vi) the "restraint made itself felt to a substantial degree" (R626a). Record references in support of the foregoing findings appear in the Statement of the Case, infra.

The question presented is this:

Whether 133 Home Delivery Dealers acting pursuant to agreement among themselves to boycott and actually boycotting 32,000 daily newspapers of respondent carrying world-wide news and advertising out of a total daily circulation of 290,000, for the purpose of compelling the respondent to refrain from selling its papers to independent newsboys who competed with the boycotters constitutes a violation of sections 1 and 2 of the Sherman Act?

As to petitioners' reservation (footnote p. 2 of petition) to argue the question whether stoppage of local distribution of a newspaper constitutes a substantial restraint on interstate commerce in the instant case, it is submitted that this court has declared that the local dissemination of national and worldwide news and advertising falls within the purview of the Sherman Act. *Lorain Journal Company* v. *U. S.*, 342 U. S. 143, 151-152. See also *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 602, 603; *Hearst Publications* v. *N. L. R. B.*, 136 F. 2d 608 at p. 610; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111.

In the event Certiorari is granted, respondent desires to argue in support of the judgment below that both the trial court and the court below erred in holding that the Dealers' conduct did not also constitute a violation of Section 2 of the Sherman Act. *Jaffke* v. *Dunham*, 352 U. S. 280; *U. S.* v. *Amer. Railway Express*, 265 U. S. 425.

Statement of the Case.

Petitioners are Home Delivery Dealers who purchase the respondent's newspapers and deliver them to their own customers. The dealers have their own delivery equipment, employ their own newsboys to service their customers and they fix their own price. The respondent has nothing to do with the price the dealer charges for the papers he delivers (R192a).

Prior to August, 1956, the petitioners were members of an unincorporated association known as "Associated Newspaper Carriers of New Jersey" (R379a). In midsummer of 1955, a group of dealers called on the respondent and insisted that all independent newsboys be withdrawn from the area served by the dealer (R196a, 209a). Demands for the removal of the independent newsboy from their territory were repeated from time to time thereafter. Such demands were at times coupled with demands for territorial allocation among the dealers and the elimination of the independent newsboy from such territory—in other words "zoning" (R91a).

On July 13, 1956, 19 dealers appeared at the office of the Circulation Manager of the respondent and demanded that the respondent cease selling its papers to the independent newsboys in their territory or else they would refuse to deal with the respondent (R92a, 145a-146a, 396a). Upon respondent's refusal to accede to this demand, the 19 dealers boycotted 15,000 of the respondent's papers daily from July 13, 1956 to July 28, 1956. During the 1956 boycott, the petitioners attempted to persuade large advertisers of the respondent to refrain from using the respondent's papers for advertising (R365a). This boycott ended on July 28, 1956. The petitioners claimed that the boycott was terminated by respondent's agreement to dry up the independent newsboys and to gradually eliminate them from the dealers'

territory (R450a-451a). The respondent denied that this was agreed to (R148a, 187a, 189a, 220a-222a, 282a-283a).

On August 23, 1956, shortly after the end of the boycott, 18 of the boycotting dealers organized themselves into "Allied Newspaper Carriers of New Jersey", a corporation, organized among other things "to act as a single unit or body in determining fair pricing and means and methods of delivery of newspapers * * *; to act in common concert for the individual financial betterment of each of its members * * *" (R47a). The membership of Allied is statewide (R47a) and is available to Home Delivery Dealers only, but not to newsboys (R108b). The initial membership of 18 grew to 40-45 by January, 1957 (R423a) and boasted 133 in May, 1957 (R430a).

After July 1956, several months of harmony ensued but in the latter part of 1956 the dealers boasting of an increase in their membership, renewed their demands for the removal of the independent newsboy from their territories (R287a). When this demand was again rejected by the respondent, the demand for zoning was renewed (R454a-456a) and when that was rejected, the members of Allied voted to boycott the respondent's papers. On May 20, 1957, 32,000 papers daily of the respondent were boycotted by the dealers. This boycott continued until it was enjoined by a preliminary injunction on June 18, 1957.

During this 1957 boycott, the dealers again circularized large advertising customers of the respondent and advised them that there were approximately 40,000 of the respondent's papers not being delivered (R442a-443a and R105b-106b).

The trial court found that the object of the dispute "is to force the plaintiff to eliminate the newsboy and thereby remove the competition which the newsboys create" (R627a-628a). The trial court also found "It is perfectly obvious from the concessions of the defendants, as well as from the

testimony in this case, that the dominant object of the combined refusal to handle plaintiff's newspaper was the elimination of newsboy competition in the distribution of plaintiff's paper to the homes and places of business of its readers within the areas of the Dealers' actual or contemplated operations'" (R629a). The trial court also found that the purpose of the concerted action of the 133 dealers "was the elimination of price competition presented by independent newsboys who operated in territories which the Dealers had arrogated to or obtained for themselves for the conduct of their business of delivering newspapers to the homes * * *" (R625a-626a) and that this was "apparent in the evidence and conceded by the defendants." (R626a).

The respondent's daily circulation amounts to 290,000 papers. Its Sunday circulation is 335,000. Respondent's facilities are capable of producing 150,000 more papers than are presently produced (R84a) and it has striven to increase its circulation because of the effect on advertising rates (R125a-126a). Home Delivery Dealers distribute 62,878 daily editions and 70,631 Sunday editions (R341a) of the total circulation or better than 20% of respondent's total circulation. At the time of the 1957 boycott Allied was still in its infancy. Not all dealers had joined it and the boycott, consequently, affected only 32,000 daily editions or approximately 50% of the total circulation controlled by Home Delivery Dealers. In 1957, the Dealers actually boycotted approximately 11% of the respondent's total circulation. The economic significance of this 11% of the circulation can be evaluated when it is noted that a 4% or 5% increase or decrease in circulation will affect advertising rates (R310a-311a) and that generally, advertising constitutes more than two-thirds of a paper's total revenues. *Times Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, at p. 604.

The price that the Home Delivery Dealer charges his customer varies with each dealer and on occasion varies

with the customer, depending on accessibility and ease of delivery. The price varies from 50¢ to 68¢ for six daily and one Sunday paper (R130a). Most dealers charged an average price of 55¢ a week for the papers. The amount of money involved on an annual basis of the 32,000 boycotted papers is substantial; using an average weekly delivery price of 55¢, the dollar volume is $915,200 annually (32,000 x 55¢ = $17,600 x 52 weeks = $915,200). If all Home Delivery Dealers controlling a circulation of 62,878 daily papers had participated in the boycott, the dollar volume would be close to $1,800,000 annually and this is a fair projection because the purpose of Allied is to include all Home Delivery Dealers in its organization.

Petitioners' statement in the first footnote on page 9 of their brief that independent newsboys deliver 140,000 daily copies is not in the record below and is erroneous. But if we accept this figure as true, then the Dealers' purpose to eliminate independent newsboys becomes even more vicious and inadmissible as a restraint on commerce when it is noted that the circulation ascribed to the newsboy by the petitioners is almost 50% of the total circulation and the object of the boycott was to eliminate this means of distribution, ultimately affecting 50% of the total circulation.

The Home Delivery Dealer is an important segment of the means of distribution of respondent's paper available to the reading public and there is no policy of hurting him (R245a). It is the policy of the respondent to encourage Home Delivery Dealers to handle its papers (R197a). Respondent has turned over thousands of readers to the dealers and intends to continue to do so (R110a-111a, 199a). It is the publisher's concern "that our newspaper be available to whoever wants to read it, we maintain that we have the right to deliver our newspaper" (R203a). The dealer charges what he likes for the services he renders and this is also true of the independent newsboys (R208a).

Petitioners' assertion in the first footnote at page 6 of their brief that the dealers demanded the removal of the newsboys from their territories because they feared the News was attempting to replace them with newsboys is unsupported by the record. The dealers' circulation actually increased between 1950 and 1957. In April, 1950, the dealers throughout New Jersey bought 55,970 daily and 50,919 Sunday editions. In April, 1957, the dealers throughout New Jersey bought 62,878 daily and 70,631 Sunday editions, thereby showing an increase in business of approximately 7,000 daily and 20,000 Sunday editions (R340a-341a). The number of Home Delivery Dealers throughout this 7-year period remained about the same (R108a). The real basis for the two boycotts was not fear of loss of business but rather a desire to eliminate competition from the newsboys in the Home Delivery field.

Petitioners' statement at p. 5 that "the Association complained to the News that distribution of the papers was being made to the dealers after the newsboys (R620a-621a), thereby giving the boys a service advantage to offer prospective subscribers" is not true and petitioners' reference to R620a-621a is to the Court's opinion and does not support the assertion. Late deliveries to dealers were sporadic and were occasioned by a press break down or other events over which the respondent had no control. All these incidents were eliminated and press time for each edition was advanced one-half hour (R88a-89a, 159a). The record contains the testimony of only one dealer that the newsboys received papers before he did (R528a) but he admitted that this occurred because of the way the union truck driver ran the route and that the respondent could not change it because of the union (R530a).

The court below stated that the "facts found by the district court were mostly conceded * * *. In any event there is substantial support in the record for the court's fact findings which are set out in great detail in the opinion

below" (p. 45 petitioners' appendix). In view of the economic data in the record and findings of the trial court as well as the court below, we respectfully submit that the petitioners have created a straw man in stating in their "Question Presented" that there was "complete absence of record evidence or court findings of the economic power of the boycotting group."

Reasons Why the Writ Should Not Be Granted.

The instant case presents no novel factual or legal question. It is a classic example of a group refusal to deal with a person as a means of coercing him from dealing with other persons. This court has frequently held or declared that the restraints imposed by group refusal to deal are illegal *per se*. *Fashion Originators' Guild* v. *Federal Trade Com.*, 312 U. S. 457, 467-468; *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 522; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214; *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 625; *Northern Pac. R. Co.* v. *U. S.*, 356 U. S. 1, 5; *Klor's Inc.* v. *Broadway-Hale Stores, Inc.* —— U. S. —— 3 L. ed. 2nd 741 (Apr. 20, 1959, Advance sheets pp. 744-745).

The petitioners claim, however, that the *per se* illegality of the boycott as a violation of the Sherman Act loses its force "in the complete absence of record evidence or court findings of the economic power of the boycotting group." We submit that no decision of this court requires such record evidence; if it did, the *per se* doctrine would be meaningless. Indeed, the contrary has been held by this court. Thus, in *Northern P. R. Co.* v. *United States*, 356 U. S. 1, Mr. Justice Black said at p. 5:

> "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and there-

> fore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. United States *v.* Socony-Vacuum Oil Co., 310 U. S. 150, 210, 84 L. ed. 1129, 1161, 60 S. Ct. 811; division of markets, United States *v.* Addyston Pipe & Steel Co. (C. A. 6 Tenn.), 85 F. 271, 46 L. R. A. 122, aff. 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; *group boycotts,* Fashion Originators' Guild *v.* Federal Trade Com., 312 U. S. 457, 85 L. ed. 949, 61 S. Ct. 703; and tying arrangements, International Salt Co. *v.* United States, 332 U. S. 392, 92 L. ed. 20, 68 S. Ct. 12." (Italics ours.)

As recently as April, 1959, this Court said in *Klor's*:

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' Fashion Originators' Guild *v.* Federal Trade Com., 312 U. S. 457, 466-468, 85 L. ed. 949, 953-954, 61 S. Ct. 703. Cf. United States *v.* Trenton Potteries Co., 273 U. S. 392, 71 L. ed. 700, 47 S. Ct. 377, 50

A. L. R. 989. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in Kiefer-Stewart v. Seagram & Sons, 340 U. S. 211, 213, 95 L. ed. 219, 223, 71 S. Ct. 259, 'Such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. United States v. Patten, 226 U. S. 525, 542, 57 L. ed. 333, 341, 33 S. Ct. 141, 44 L. R. A. N. S. 325." 3 L. ed. 2d at p. 744.

But even if the *per se* doctrine required record evidence of the economic power of the boycotting group, we submit that such a requirement was satisfied in the instant case. Both the trial court and the Court of Appeals found that the 1956 boycott affected 15,000 daily papers and that the 1957 boycott affected 32,000 papers. The relationship between the boycotted papers to the total circulation of 290,000 daily papers also appears in the record. The record also shows the effect of a 5% increase or decrease in circulation on advertising rates and that the dealers sought to influence large advertisers from dealing with respondent. The record is replete with evidence that the dealers' purpose in imposing the boycott was to eliminate the newsboy as a competitor or to bring about an allocation of territory that would ultimately bar the newsboy as a competitor.

The fact that the respondent did not submit to the dealers' demands does not prove that the boycott was lawful. The legality of a boycott is not measured by its results; the boycott is illegal even though it has not yet successfully attained its end. *Lorain Journal Company* v. *United States of America*, 342 U. S. 143 at 153. The Sherman Act is prophylactic as well as remedial. Petitioners' notion that there must be "broad economic and financial strength effectively to oppose the boycotted party or to maintain efficient control of the various elements of the boy-

cotting group" (p. 10—petitioners' brief) finds no support in the cases and the notion rests on the basic fallacy that the boycotting group must have sufficient strength to attain the objective of the boycott, otherwise the boycott is legal. Such a notion would permit a multitude of restraints already declared illegal by this court in cases where the restraints on commerce did not completely destroy the commerce involved. Cf. *Eastern States Retail Lumber Dealers Assn.* v. *U. S.*, 234 U. S. 600; *Fashion Originators' Guild* v. *Federal Trade Com., supra*; *U. S.* v. *Women's Sportswear Mfg. Assoc.*, 336 U. S. 460; *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218; *Mandeville Is. Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219.

When petitioners say at p. 12 that the concerted action in boycotting the respondent "may well indicate nothing more than continued voluntary desire in each member to pursue the collective goal" to make this court believe this was unconscious parallelism without disciplinary sanctions to compel conformance, they have deliberately overlooked (i) their express agreement and concerted action in the boycott in 1956, (ii) the unanimous "strike vote" they took to boycott the respondent in 1957 (R237a-239a, 270a, 423a), (iii) the unanimous agreement not to deal with the respondent from May 20, 1957 to June 18, 1957 (R429a-431a); and this by some dealers who had no boys in their territories (R562a). They have also shut their eyes to the purpose for which Allied was formed as expressed in its Certificate of Incorporation. Petitioners have also ignored the concession they made at the trial level that the "actions and refusals to deal complained of by the plaintiff resulted from an agreement and combination of the individual defendants [Dealers] through their membership in the corporate defendant [Allied]" (R613a), just as they have ignored the Court's finding that the object of the boycott was to force the plaintiff to eliminate the newsboy and thereby remove the competition which the newsboys created. We are puzzled by petitioners' oblique philosophical argu-

ment that it is inferrable that there was no agreement to boycott in view of the record evidence and concessions.

The record amply supports the court's findings that "the restraint made itself felt to a substantial decree" (R626a). The amount of commerce controlled by the boycotting dealers in the case at bar was on the rise, having doubled in less than one year since the organization of Allied whose potential had not yet been fully realized when the boycott of 32,000 papers was enjoined. To call Allied a "modest enterprise" and the boycott of 32,000 papers daily "feeble attempts * * * to make their feeble protests effective" is pure phantasy. The amount of commerce involved in the case at bar is as substantial as the $500,000 worth of salt involved in *International Salt Co.* v. *U. S.*, 332 U. S. 392 or the 5,000 taxi cabs in the four cities involved in *U. S.* v. *Yellow Cab Co.*, *supra*, or the 50% of the sportswear controlled by the stitching contractors in Boston, which city ranked fifth in the stitching contracting market in *U. S.* v. *Women's Sportswear Mfg. Assoc.*, 336 U. S. 460.

The latest declaration of this Court in *Klor's* v. *Broadway-Hale*, *supra*, does not require a showing of power in the boycotting group. Reference to Judge Barnes' opinion in *Klor's* in 255 Fed. Rep. 2nd 214 at p. 223, shows that there were many other widely advertised competitive brands available to Klor's which Klor's could have purchased to keep its business going without handling the boycotters appliances. Under these circumstances, the boycotters did not have the power to put Klor's out of business; yet this court found that the restraints imposed by the boycotters were at war with the Sherman Act. The test was not whether Klor's could survive in view of the restraints imposed upon it, but whether the restraints took from Klor's its freedom to buy appliances in an open competitive market. In the case at bar, the dealers' boycott would deprive the reading public of its freedom to buy from a newsboy and would prevent the respondent from selling

its papers to anyone but dealers in the home delivery market. The rule for which petitioners contend would require an investigation into the financial strength of the boycotted person to see if he could survive the boycott. This suggestion demonstrates its own absurdity and would establish one rule for the strong and another rule for the weak, and the legality of the conduct of the boycotters would depend upon the end result of the boycott rather than upon the means employed and its effect on interstate commerce. The Sherman Act condemns all combinations and conspiracies which restrain the free and natural flow of trade in interstate commerce, and the condemnation does not depend on the success or expectation of success of the boycotters.

We respectfully reiterate that the legal issues before the District Court and the Court of Appeals for the Third Circuit have been definitely established by the prior pronouncements of this Court; that the case at bar is a factual one; that the record below adequately and fully supports the findings of fact by the trial judge and that there has been a proper application of the rules established by the prior decisions of this Court to the proofs in this case.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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JUN 17 1958

JAMES R. BROWNING, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 933.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,

Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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The brief filed on behalf of the respondent requires a brief reply.

1. The respondent (Resp. Br. 3) insists upon introducing an alleged violation by petitioners of § 2 of the Sherman Act. The District Court held that the evidence failed "to sustain the charged violations of § 2 of the Sherman Act" (R. 632a). Since the respondent did not cross-appeal that finding to the Court of Appeals, it is strange to find respondent urging here that petitioners' conduct constituted a violation of § 2 of the Sherman Act. Its failure to appeal below should bar it from urging that ground now and later (if certiorari is granted). *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435 (1924).

2. In an attempt to inflate the effect of petitioners' activities on respondent's total circulation, the respondent's brief distorts the facts by failing to consider that in 1957 the News substituted home delivery for 16,000 of the 32,000 copies affected by the boycott, thus reducing the total number not delivered to 7½% of the home delivery market. (See Pet. Br. 6-7). Furthermore, respondent's brief makes reference to petitioners' second boycott affecting 50% of the "total circulation controlled by Home Delivery Dealers" (Resp. Br. 6). But the record shows that the District Court found the relevant market was the *entire* home delivery market (R. 626a), which includes deliveries by newsboys as well as by dealers.

While the record is not clear as to the total number of papers which are "home delivered" throughout the state, there is record evidence that the respondent had 2,500 newsboy routes (R. 119a) throughout New Jersey, operated by newsboys to whom the routes are lent (Ex. D-1; R. 603a), and that the News owns 604 such routes in Essex County alone (R. 163a). Its complaint alleged that 34,000 daily papers were delivered in Essex County by 603 [*sic*] newsboys (R. 31a). Thus it may be inferred that an average News newsboy distributes 57 papers. Multiplied by the 2,500 newsboys referred to, this means the "home delivery" by newsboys of 142,500 daily papers. When added to the total "home delivery" by dealers, an aggregate number of 209,500 daily papers appears to be "home delivered". This means the total number of papers undistributed, 16,000, constituted 7½% of *all home deliveries.*

3. The assertion by the respondent "that a 4% or 5% increase or decrease in circulation will affect advertising rates" (Resp. Br. 6) is directly contrary to the record evidence, supplied by its own witness (R. 310a to 317a). The respondent's witness, employed by an advertising agency which had represented the News for 63 years, testified that the 15-day boycott in 1956, did *not* result in any loss to the

respondent or decrease its advertising rates (R. 316a, 317a), and he did not know of any advertiser who complained (R. 316a). He refused to say whether a loss of 20,000 in circulation would hurt the respondent financially (R. 312a-315a). While the respondent did not produce any of its contracts with its advertisers, the same witness testified that such contracts contained no provision for revision because of a drop in circulation (R. 313a).

4. The respondent's brief (Resp. Br. 7) also distorts the alleged "dollar volume" effect of the boycott. The arithmetic indulged in by the respondent grossly and unfairly exaggerates the impact of the petitioners' acts. Respondent assumes that 32,000 papers were not delivered; as pointed out above, this simply is not so—only 15,000 daily papers were affected by the June, 1956, boycott (R. 622a-623a), and only 16,000 daily papers went undelivered during the 4 week trial period in May and June, 1957 (Pet. Br. App. A, p. 17). Secondly, respondent uses the dealers' weekly *sale price* (55¢) to show the effect upon the News. But the only meaningful figure, for purposes of showing the impact of petitioners' activity upon the News, is the revenue lost by the News, not that lost by the dealers—i. e., the dealers' weekly *cost price* paid to the News, 31.8¢ for six daily and 1 Sunday paper (R. 85a). If these correct figures are used, the dollar volume is 16,000 daily papers × 31.8 cents, for a total of *$5,088* per week, not *$17,000* a week as projected in respondent's brief. Nor can this amount fairly be multiplied into an annual volume. Since the record shows that newspapers purchased from the News by the dealers represented well over 90% of the afternoon business of the dealers called to the witness stand during the trial (Pet. Br. App. C, pp. 26, 27), it is wholly naive to suppose that the dealers could survive any protracted boycott. Their very livelihood depended upon the News' business. Nor is there an iota of record substantiation for respondent's final multiplication, based as it is on the wholly

unwarranted assumption that all home delivery dealers either are now or will become members of Allied.

[The discussion above, in Points 2, 3, and 4 of this Reply Brief, throws into focus the basic inadequacy of the decision below, and highlights the question upon which certiorari is sought by petitioners; namely, whether on this meager record, altogether lacking any comparative evidence of respondent's total annual revenue, profits attributable to the home dealers' business, etc., and in the complete absence of court findings as to economic power of Allied, it is valid to declare petitioners' action *per se* illegal.]

5. The accusation by the respondent that the "dealers again circularized large advertising customers of the respondent and advised them that there were approximately 40,000 of the respondent's papers not being delivered" (Resp. Br. 5) cannot be supported by the record. There was no proof that any member of Allied had called on any advertiser. The only evidence was that a committee was appointed to confer with advertisers (R. 443a).

6. Respondent's argument (Resp. Br. 9-11, 13-14) that no showing of power whatsoever is needed to declare a group boycott illegal *per se* is artifically sweetened by a concurrent distortion of petitioners' position on this point; namely, by the imputation that petitioners argue it must appear the boycotting group has power to destroy the boycotted party before the boycott could be considered illegal. Thus, respondent erroneously concludes that petitioners would not consider the boycott in *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, U. S. , 3 L. ed. 2d 741 (1959), to be illegal.

But it should be clear that petitioners have adopted no such extreme position. Petitioners' contention is that *some showing, and court finding upon,* economic power of the boycotting group is prerequisite to imposition of the *per se* rule. As to the degree of power that is essential, petitioners argue in the alternative: (1) assuming that *Northern Pacif-*

ic R. R. v. *United States*, 356 U. S. 1 (1958), controls by way of analogy, then the record must show and the court must find *sufficient* economic power to appreciably restrain free competition in the relevant market, which was not done in this case; (2) *Northern Pacific* does *not* control, and therefore the record must show and the court must find a broader economic power, namely, sufficient economic strength—contrasting in at least introductory, minimal fashion the position of the boycotters to that of the boycotted—to create a reasonable expectation that the boycott will produce a substantial coercive effect. In actuality, the boycotted party may well resist that effect; certainly he need not be driven out of business by it. *But he cannot be as apparently immune as respondent in this case, and still rely upon the per se rule.*

7. Another distortion by respondent of petitioners' position occurs at pages 12-13 of the answering brief where respondent apparently thinks petitioners argue that no agreement to boycott ever existed. That, of course, is not so; if it were, petitioners would hardly refer to pursuit of their "collective goal" (Pet. Br. 12; Resp. Br. 12). But petitioners do contend that adherence to the collective goal was enforceable by no economic control whatsoever of the boycotting group over the members thereof. Hence, Allied was able to conduct a 4-week boycott only because the individual members voluntarily desired to continue the boycott, not because the group had coercive powers over its members.

Conclusion.

For the reasons urged herein and in the petition, a writ of certiorari should be granted.

Dated: June 12, 1959.

Respectfully submitted,

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